

## GOVERNMENT CONTROL OF TRANSPORTATION CHARGES.—PART IV.

### III.—*The Practicability of State Interference with Transportation Contracts—Continued.*

The case of *Smyth v. Ames*<sup>1</sup> aroused great excitement, and widely different views have been evoked by it. Some authorities, as Prof. Frank Haigh Dixon, of Dartmouth College,<sup>2</sup> consider that the decision enunciates no new principle, and that no one need have been astonished by it. On the other hand, the Nation<sup>3</sup> cites the case as authority for the statement that "the attempt to regulate the interstate business of railroads has broken down," because the law of this country, "by the agency of the courts, guarantees to every man and to every corporation the management of its own business. When the Constitution says that no one shall be deprived of life, liberty and property without 'due process of law,' it means, without what *the courts say* is due process of law, ascertained through judicial inquiry. Consequently, the time will never come when a political or administrative body will be allowed to fix rates and decide that they are 'just.' Until our system of civilization disappears, what is just will be determined by a court of justice according to principles laid down by judges, and not by legislatures or their delegates."

The inhabitants of the states most nearly affected by the recent decision are in a high state of indignation and wrathful uncertainty. Governor Leedy, of Kansas, has issued an interview, with the reported approval of Chief Justice Doster, of his own Supreme Court, in which he uses language of the most unrestrained denunciation, ending: "Nobody but a slave or a knave will yield assent to the 'hideous distortion of meaning which Judge Harlan gives to the word 'person' as used in

<sup>1</sup> 169 U. S. 466 (1898), modified 171 U. S. 361.

<sup>2</sup> See his article, "Railroad Control in Nebraska," in the Political Science Quarterly for December, 1898.

<sup>3</sup> Vol. 66, p. 220.

the Fourteenth Amendment, and upon which he bottoms his infamous decision, and which shows to what depths of iniquity the Supreme Court of the United States has descended." The Review of Reviews for April, 1898, contains a more temperate expression of the Western view: "I wonder if I am mistaken in regarding the recent decision of the Supreme Court, written by Judge Harlan, on the Nebraska maximum rate law, as a more dangerous one than either the Dred Scott decision or that on the income tax? The Dartmouth College decision attempted to take corporations out from under the police (regulative) power of the state by construing franchises as contracts. This decision seems to me to rule that frauds, like watering stock, and extortions like excessive charges, committed under those charters, are also contracts. . . . There is, then, absolutely no help for the people through the exercise of their reserved powers of regulation and the inalienable right of 'police regulation.' The Supreme Court rules that corporations are persons under the meaning of the Fourteenth Amendment. The corporations have added to them what must be almost the last privilege they could hope for—that of having all the privileges of personality, but none of the responsibilities. They are persons, in the eyes of our corporation-controlled courts, who can have every possible privilege, but are never to be punished like ordinary persons. . . . This is a Dred Scott decision which says that white men have no rights that any corporation is bound to respect."

Mr. H. P. Robinson, editor of the *Railway Age*, gives almost as much scope to the decision as the men of the West, and rejoices to conclude that railway rates are now absolutely beyond control of the legislatures in all the "Granger" or "Populistic" states.<sup>1</sup>

These varying views remit us, for satisfaction, to the case itself. But, before reaching the case, the previous conditions in Nebraska demand attention. These conditions amounted to a state of war between the Nebraska legislature and the railroads.

<sup>1</sup> See Mr. Robinson's article in the *North American Review* for April, 1898.

A legislature is usually a body whose technical knowledge of railway management is of the slightest; its members, especially in a Western state like Nebraska, are apt to be innocent of bondholding or shareholding; and, looking at the matter solely from the standpoint of the land-owning and producing classes, are inclined to treat the railroad much as the early English Parliaments treated the laborers and merchants. The legislature, though representing the state, must feel weaker in wealth and material resources than the railroads it attempts to control. Mr. A. G. Warner<sup>1</sup> pointed out, eight years ago, that "in financial power . . . the railroad systems indefinitely surpass any state that their branches happen to cross." The annual revenue of Nebraska is between two and three millions; the annual earnings of the railroads running through the state are from ten to thirty millions each. "It will be seen how disproportionate is the financial strength of the antagonists, if only one of the railroads is at issue with the state on a given question; and, on a question where it is the state against all the railroads, the odds are still more in favor of the latter." Mr. Warner then proceeds to show how this financial superiority of railroads enables them to command the services of men of greater ability than the state can afford to do. The salaries of the railway officials run upwards to \$20,000, or even higher, while the highest paid state official in Nebraska receives only \$2500 a year. The present constitution, having been adopted just after the grasshopper plague, provides in every case for the lowest possible salary, and limits the legislature to a sixty days' session every two years.

The railroads all have their principal offices and over half their mileage outside the limits of the state. "Practically none of the stocks and bonds of the railroads in Nebraska are owned by Nebraskans. The owners and controlling officers of the roads are non-residents. This absenteeism increases the popular dislike of the road. It is felt that any unearned profits not only injure individuals but impoverish the community as a whole, while the representatives of the roads within the state are looked upon as mere hirelings, owing to the

<sup>1</sup> "Railroad Problems in the West," VI Pol. Sc. 66. March, 1891.

companies duties, which are inconsistent with good citizenship."

The mileage of the Nebraska roads increased from 305 in 1866 to 1100 in 1875, and to 5500 in 1893. The growing importance of the railways caused the constitution of 1875 to empower the legislature to fix maximum charges, to prevent discrimination, and to enforce its mandates by forfeiture if necessary. The Act of February 2, 1881, was passed "to prevent discrimination," and provided that the rates should not be higher than the published rates of November 1, 1880, which were the lowest up to that time. A Railroad Commission was created by the Act of March 5, 1885 (Laws, ch. 65). This was changed by the Act of March 31, 1887 (Laws, ch. 60), to the "Board of Transportation," composed of five state officers and three other members appointed by the former. Upon these latter, of course, fell most of the work. The powers given this board were almost identical with those exercised by the English "Board of Trade."<sup>1</sup> The principal difference is that the orders of the English Board of Trade are "confirmed" in each case by a special act of Parliament, while those of the Nebraska Board were enforced by mandamus from the State Supreme Court. Thus, in the year of the passage of this act, the Fremont, Elkhorn and Missouri Valley Railroad refused to conform to an order of the Board reducing its rates  $33\frac{1}{3}$  per cent. This order the Supreme Court enforced by mandamus in *State ex rel. Board of Transportation v. Fremont, E. & M. V. R. Co.*<sup>2</sup> But the actions of the Board of Transportation did not satisfy the farmers, who constituted the bulk of the Nebraska population. According to Mr. Warner's article<sup>3</sup> the politicians publicly opposed the railroads, but secretly were "influenced" to subservience. "The language and the actions of the politicians" were so inconsistent that the people became enraged beyond endurance. The result of the ensuing campaign was the law of April 12, 1893, an act "to regulate railroads, to classify freights, to fix

<sup>1</sup> See *infra*.

<sup>2</sup> 22 Neb. 313, S. C., 35 N. W. 118 (1887). Opinion by Maxwell, C. J.

<sup>3</sup> *Supra*.

reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act."<sup>1</sup> Section 5 of the statute provided that if any railroad in the state should believe the schedule of rates prescribed by the act to be unjust and unreasonable, opportunity should be given for such railroad to bring action in the Supreme Court of the state against the State of Nebraska; "and upon a hearing thereof, if the court shall become satisfied that the rates herein prescribed are unjust in so far as they relate to the railroad bringing the action, (it) may issue their (its) order directing the Board of Transportation to permit such railroad to raise its rates to any sum in the discretion of the Board," provided the new tariff did not exceed that in force January 1, 1893. This law was to go into effect August 1, 1893. Proceedings to test the law were begun July 28, 1893, and complainants obtained from the United States Circuit Court a decree enjoining all enforcement of the act, which was finally passed upon by the Supreme Court March 7, 1898, nearly five years after its passage. Brewer, J., said in the Circuit Court at Omaha:<sup>2</sup> "If it would be unreasonable to reduce the total earnings of these roads 29½ per cent., it is *prima facie*, at least, equally unreasonable to so reduce any single fractional part of such earnings;" and the learned justice, following this argument, found the *prima facie* confirmed by the elaborate tables and schedules submitted to him, and made the preliminary injunction permanent. Dundy, J., concurred. From this it is to be inferred that an unreasonable rate, *prima facie*, is one which reduces compensation. The converse would follow, that a reasonable rate is one increasing, or not decreasing, the income of the carrier. The opinion of Mr. Justice Harlan in the Supreme Court is much to the same effect. This question,

### 1. What is a Reasonable Rate?

was pronounced by Judge Cooley, in his address to the Con-

<sup>1</sup> Acts of Nebraska, 1893, ch. 24, p. 164; compiled Statutes of Nebraska (8th Ed.), 1897, c. 72, art. 12, p. 819.

<sup>2</sup> 64 Fed. 165 (1894).

vention of Railroad Commissioners, March 3, 1891, at Washington, to be *the* railroad problem. It seems to be one almost baffling solution. Said Railroad Commissioner Becker, of Minnesota, addressing the Fifth Annual Convention of Railroad Commissioners in 1893, "I have never seen yet an answer to the question, What is a reasonable rate?"<sup>1</sup>

#### 1. The Railway View.

The argument is sometimes made that "the market value of the service," or "what the traffic will bear," is the only reasonable rate. It is asserted that the utmost possible charge for transportation is limited to the difference between the cost of the commodity at the place of production, and its price at the terminus of the road. Elaborate arguments are made to show how competition between the shipper and carrier for the margin of profit which lies in this difference, will gradually result in a compromise, satisfactory to neither party, perhaps, but still infinitely preferable to any rate arbitrarily fixed by an outside body.<sup>2</sup> The argument is plausible, and the reasoning of a kind that falls in with traditional American ideas of personal independence. But the statement that the carrier's charge is limited to the difference between the cost of the article at one point and its selling price at the other, ignores the fact that this very selling price is determined by the average cost of production of the commodity plus the average of the transportation charges to the market, and is thus a *petitio principii*. The view of the question from this latter standpoint convinces many that if the railway is uncontrolled by law, "it can levy what tribute it pleases, direct the channels

<sup>1</sup> Mr. H. R. Shorter, State Railroad Commissioner of Alabama, said at Washington, in May, 1895 (see report Seventh Annual Convention Railroad Commissioners, p. 35), "For the past ten years, in an official way, I have wrestled with these two questions—the value of a railroad and a reasonable rate. I never found, during my experience as a Railroad Commissioner, what was a reasonable rate until I got that information from the distinguished former chairman of the Interstate Commerce Commission in this room several years ago, when he said to me that he believed, as the result of his observation, that a reasonable rate was one under which a trader thought he had some little advantage of his adversary."

<sup>2</sup> "Railroad Stockwatering," by Thomas L. Greene, VI Pol. Sc. Q. 474.

of trade and the tides of business, make and unmake cities, build up and put down industries, enrich and impoverish individuals and communities. . . . 'The state must control the railways or the railways will control the state.'"<sup>1</sup>

## 2. The "Public" View.

So conservative a jurist as the late Justice Cooley declared that "So long as five hundred bodies of men in the country are at liberty to make rate sheets at pleasure, and to unmake or cut and re-cut them in every direction at their own unlimited discretion, or want of discretion, and with little restraint on the part of the law, except as it imposes a few days delay in putting changes in force, the problem will remain to trouble us; the mere existence of the power, making losses, disorder and confusion constantly imminent. The authority to reduce rates when they are found to be excessive is but a slight corrective. . . ."<sup>2</sup>

Railroad Commissioner Becker, of Minnesota, said further, ". . . the expense which a railroad company is at to carry the freight, or to manage its business affairs, is a matter which does not enter at all into the question of what is a reasonable rate. . . . When we consider the question of a reasonable rate, we look at it from the railroad standpoint, not from the standpoint of the shipper, and we are apt to forget the interest of the shipper. . . . I don't believe the railroads will be justified in demanding a rate which will crush out the industries of the country. . . . I object most strenuously, as a citizen, against any form of authority which undertakes to say that the people of this country are bound forever to pay the interest upon the bonds of any railroad company by freight tariffs, or the dividend upon any stock by freight tariffs. . . ."<sup>3</sup>

The "public" view thus defines a reasonable rate as *that*

<sup>1</sup> Report Com. on Reasonable Rates, Fourth Annual Convention Railroad Commissioners.

<sup>2</sup> Address of Hon. Thomas M. Cooley, Chairman, to the Convention of Railroad Commissioners, report of Third Annual Convention, page 31.

<sup>3</sup> Address to the Fifth Annual Convention of Railroad Commissioners, at Washington, 1893.

*which is reasonable for the people to pay, not what is reasonable for the carrier to receive.*<sup>1</sup>

What may be characterized as

### 3. The "Judicial" View

occupies a position somewhere between these two extremes and will most clearly appear in the discussion of

### *2. The Means for Determining a "Reasonable Rate."*

Mr. Justice Harlan declares<sup>2</sup> that in order to determine whether any given rates are, or are not, such as to allow the carrier reasonable compensation, the basis of calculation must be "the fair value of the property" used by the corporation. "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, *the amount and market value of its bonds and stock* (italics mine), the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case."

Also, ". . . the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the business of an interstate character done by the carrier, or to the profits derived from that busi-

<sup>1</sup> This definition receives support in *Canada Southern Railway Co. v. International Bridge Co.*, 8 App. Cas. (P. C.) 723 (1883), in which the question arose of what was a reasonable rate of toll over a public bridge. Complaint had been made that the tolls were unreasonably high, because resulting in a enormously large profit to the bridge company, but the court held that the profits made by the company were to be absolutely disregarded, the sole criterion being the reasonableness from the standpoint of the public. The tolls being reasonable, viewed in that light, they could stand, though the company obtained fabulous returns. "It certainly appears to their Lordships that the principle must be, when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged." (P. 371.)

<sup>2</sup> *Smyth v. Ames*, 169 U. S. 466, at p. 546-7.



ness.”<sup>1</sup> Or, as this part of the decision is explained by Mr. Robinson, “the rates imposed in Nebraska by the state legislature must be such as will give a fair return on the railway properties *inside the State of Nebraska*, measured by the volume of business *in Nebraska*. A railway company, say the Burlington road, cannot be compelled to do Nebraska business at unprofitable figures, on the ground that its lines in, perhaps, Illinois, are so profitable that the company, as a whole, will still make money.”<sup>2</sup>

<sup>1</sup> Smyth v. Ames, *supra*, at p. 541.

<sup>2</sup> See article in N. A. Rev., April, 1898. It appears from this article that on the average a railroad costs for operating at least seventy per cent. of its gross earnings. Mr. Robinson has calculated the earnings per mile for the railroads in each of twenty-eight states, together with the amount of capital upon which the net income of these roads will pay interest at the rate of six per cent. The table follows:

State.	Gross Earnings per mile.	30 per cent. of gross earnings.	Being 6 per cent. upon :
North Carolina.....	\$2,864	\$859	\$14,320
South Carolina.....	3,125	937	15,620
North Dakota.....	3,419	1,025	17,090
Georgia.....	3,484	1,045	17,420
Nebraska.....	3,487	1,046	17,433
Texas.....	3,742	1,122	18,710
Alabama.....	7,781	1,134	18,900
Michigan.....	3,835	1,150	19,170
Kansas.....	4,482	1,344	22,610
Missouri.....	4,768	1,430	23,860
Iowa.....	4,792	1,437	23,960
Wisconsin.....	5,346	1,603	26,730
Maine.....	5,446	1,633	27,230
Kentucky.....	6,003	1,800	30,010
Virginia.....	6,393	1,902	31,710
Minnesota.....	6,492	1,977	32,960
Illinois.....	6,506	2,041	34,030
California.....	8,199	2,459	40,990
Ohio.....	8,563	2,568	41,610
Massachusetts.....	10,118	3,035	50,590
New Hampshire.....	11,361	3,408	56,800
New York.....	13,787	4,136	68,930
Pennsylvania.....	15,103	4,530	75,510
Connecticut.....	15,698	4,709	78,490
Rhode Island.....	16,223	4,866	81,110
New Jersey.....	18,777	5,633	93,880
Vermont.....	18,932	5,679	94,660

From this table, Mr. Robinson draws the conclusion that “the recent decision places an absolute veto in the way of any legislation in any one of twenty-six states (the twenty-six consist of the eleven in the above table, which have not business enough to produce a profit on railway operation, together with fifteen other states for which the figures are not available, but which, as Mr. Robinson says, ‘undoubtedly fall

### 3. *Whose Determination Shall be Final?*

This question is decisively met and answered. "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry." . . . "The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is inconsistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. *This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare*

in the same category,') which will reduce rates or cut down earnings. In each and every one of them, no law which by any amount, however small, *adds to the burdens of the railway companies*, can be constitutional." To these states are to be added, twelve states in which the railroads can make only a "fair profit," under present conditions, and accordingly, "the railway companies will have no difficulty whatever in showing any such (restrictive) legislation to be plainly confiscatory and unconstitutional." There are left in the entire Union only eight states whose roads have an average earning capacity of \$10,000 and upward, and in which alone restrictive legislation under the Nebraska Decision would be constitutional; and these are states with little disposition to trouble the railway rates.

We thus have the authority of one of the railway experts of America for the startling proposition that the Nebraska Freight Tax Decision absolutely forbids, as long as the conditions under which it was delivered continue, any government restriction of transportation charges in thirty-eight states of the Union. If such government regulation is a desirable thing, the conclusion thus reached might perhaps lead us to doubt, with deference, the wisdom of the action of the Supreme Court

*null and void all legislation that is clearly repugnant to the supreme law of the land.*<sup>1</sup>

4. *What Amounts to a "Taking" of Property "Without Due Process of Law?"*

The answer to this has already been foreshadowed. "A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it *and to the public* (italics mine), would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would, therefore, be repugnant to the Fourteenth Amendment of the Constitution of the United States."<sup>2</sup>

Does the case decide anything new? It seems to the writer that it certainly does. Its adjudications on several points are either entirely novel or else presented with a strength and positiveness hitherto unknown.

(1) The definition of a reasonable rate was before unsettled, and still is so. But now we know that the primary ingredient is *reasonableness from the standpoint of the return to the carrier*, other considerations, such as the interests of the public, being placed subordinate to the former.

(2) So clear an enumeration of the means for determining a reasonable rate had never before been attempted. It is very novel, in two points particularly, (a) in calculating the rate by the "market value of the stocks and bonds," and (b) in the entire exclusion of interstate business from the elements entering into the determination of the intra-state rate.

(3) The question, whose determination shall be final, has at last received an authoritative answer. As matters now stand, the final determination of the reasonableness of any rate assessed by public authority upon a business in which the public is specially interested rests with the Federal Courts, provided only some stockholder in the corporation is a citizen of a

<sup>1</sup> Smyth v. Ames, *supra*, at p. 526.

<sup>2</sup> *Ib.* p. 526.

state other than that of the charter, a nearly invariable circumstance.

(4) No positive and authoritative statement had been previously enunciated that a rate, if "unreasonable," on that account necessarily "takes" property "without due process of law."<sup>1</sup>

<sup>1</sup> Another entirely novel conclusion is embodied in the following language of the opinion in the Nebraska Freight Case (see pp. 549, 550): . . . "But it may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed for the better since the decree below, and that the rates prescribed by the statute of 1893 may now afford all the compensation to which the railroad companies in Nebraska are entitled as between them and the public. In anticipation, perhaps, of such a change of circumstances, and the exceptional character of the litigation, the Circuit Court wisely provided in its final decree that the defendants, members of the Board of Transportation, might, 'when the circumstances have changed so that the rates fixed in the said act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid,' apply to the court, by bill or otherwise as they might be advised, for a further order in that behalf. Of this provision of the final decree the State Board of Transportation, if so advised, can avail itself. In that event, if the Circuit Court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute." Accordingly the decree of the court was modified in 171 U. S. 361.

It appears from this that an act may be unconstitutional this year, but constitutional next year, if increase of business or reduction of expenses brings greater prosperity to the railroads. Conceivably an act might be unconstitutional January 1st, and constitutional February 1st; void today, but good to-morrow. In like manner an act constitutional on the day it becomes law may come to be unconstitutional by operation of nothing more than lapse of time, weeks or months or years. Under this decision we might have laws valid up to the 1st of January, 1898, invalid for six months or a year thereafter, perhaps after this interregnum to take on a new lease of validity. If a law is constitutional when passed, and the railroad officials know that it will become void if the net earnings are reduced by its operation, will there not be the strongest incentive to make such reduction appear? and when the railroad attorney appears before the Circuit Court for a temporary injunction, the court, to give a decision with an approximation to fairness, must go into the question of whether or not the railway expenses are legitimate—whether the officers are not too numerous or too highly paid. On this hypothesis the prospect before our already overworked Federal Courts is anything but

It has been urged, in opposition to the court's conclusion, that a "basis of all calculations as to the reasonableness of rates," which consists in part of "the market value of the bonds and stock" (see opinion quoted above), involves reasoning in a circle, a begging of the question, because such market value depends upon an earning capacity determined by the rates charged—the very thing it is proposed to restrict. By the method of calculating used in the opinion, evidently a statute might be constitutional for one road and unconstitutional for another. Or, if the court should favor uniformity of rates for parallel roads, the wonder arises what rates the legislature *can* prescribe, since any imaginable tariff must necessarily fail to give a net profit to some road; and one road on the verge of bankruptcy might secure the privilege of high rates for all the wealthier railways running parallel with it.

Again it has been declared that, in entirely excluding interstate transportation from consideration in computing the rate within the state, the court has adopted a more conservative method of estimate than the railroads themselves. Freight charges to grain elevator centres, and to cities engaged in the pork and beef-packing industries, are often voluntarily placed by the roads at a rate which would result in a dead loss, if it were not for the interstate business thus stimulated.<sup>1</sup>

It will be seen that there appears in this case a novelty, both of expression and of substance, almost unheralded in previous decisions. Various expressions, which might be applied to the circumstances of the Nebraska case, had been used in other cases, but few of these were more than *dicta*. In *Munn v. Illinois*<sup>2</sup> it was said that "down to the Fourteenth

cheerful. Moreover, the cases would invariably be appealed from the Circuit Courts to the Supreme Court, and the decision reached by that body, after lengthy and laborious examination of all the details of business management and the lapse of several years, would be valueless as applying to the circumstances which existed at the time the case arose.

<sup>1</sup> I am indebted to Mr. Emory R. Johnson, of the Wharton School of the University of Pennsylvania, for the attitude of political economists on this and kindred points.

<sup>2</sup> P. 125.

Amendment it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. *Under some circumstances they may, but not under all.*" But against this may be placed the Chief Justice's further language:<sup>1</sup> " . . . it has been customary, from time immemorial, for the legislature to declare what shall be a reasonable compensation . . . we know that this is a power which may be abused, but that is no argument against its existence. *For protection against abuses by legislatures the people must resort to the polls, not to the courts.*" In the Railroad Commission cases<sup>2</sup> Waite, C. J., said: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." It should be noted here that Chief Justice Waite's language, as quoted, might have been followed out literally by the courts without leading them to the extremes to which they have gone. The statement that "the state cannot require a railroad corporation to carry . . . without reward," may, perhaps, furnish an indication of what the learned justice meant by the rest of his sentence. The Chief Justice went on to show that no such question was then at issue, and the case was decided in favor of the constitutionality of the statute.

Mr. Justice Harlan quotes from *St. Louis, Etc., R. v. Gill*,<sup>3</sup> in which it was said that there is a remedy in the courts against legislation so unreasonable as practically to destroy the value of property, and that the question is a judicial one. But in this case the constitutionality of the statute of Arkansas was upheld. The case of *Covington, Etc., Turnpike Co. v.*

<sup>1</sup> P. 133.

<sup>2</sup> 116 U. S. 307, 331.

<sup>3</sup> 156 U. S. 649, 657 (1894).

*Sanford*<sup>1</sup> supports in its language the Nebraska Freight case, but no actual determination as to reasonableness of rates was made. The cause was remanded for further proceedings.

The state courts, of course, have taken a more lenient view of the legislative power. *Dillon v. R.*<sup>2</sup> says . . . "the reasonable regulation of a business . . . affected with a public interest is not a taking of property without due process of law. We cannot, therefore, judicially determine . . . that the provisions of the act are unreasonable . . . The unreasonableness of the provisions is to be determined as a question of fact," citing *R. v. Wellman*,<sup>3</sup> where Mr. Justice Brewer asks "must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings? At any rate, must the court assume that it has no such effect; and, ignoring all other considerations, hold, as matter of law, that a reduction of rates necessarily diminishes the earnings? If the validity of such a law, in its application to a particular company, depends upon a question of fact as to its effect upon the earnings, may not the court properly *leave that question to the jury* and decline to assume that the effect is as claimed? There can be but one answer to these questions."<sup>4</sup> *Winchester, Etc., Turnpike Co.*

<sup>1</sup> 164 U. S. 578, 584, 594-5, 597 (1896).

<sup>2</sup> S. C. of N. Y., 43 N. Y. Suppl. 320, 328 (1897).

<sup>3</sup> 143 U. S. 339 at 343 (1892).

<sup>4</sup> The idea that the reasonableness of a rate is a question of fact and not of law is favored in *Palmer v. London & S. W. R.*, L. R. 1 C. P. 593 (1866); *Diphwys Casson Slate Co. v. Festiniog Ry. Co.*, 2 Ry. & Can. Traf. Cas. 73 (1874); *Denaby Co. v. Manchester, Etc., R.*, 3 Ry. & Can. Traf. Cas. 426 (1880); S. C., 11 App. Cas. 97, and *Phipps v. London & N. W. R.*, 2 Q. B. D. 229, 236 (1892). These cases deal with the question of "undue preference" as making the rate unreasonable. On the other hand, in *Tobin v. London & N. W. Ry. Co.*, [1895] 2 Ir. R. 22 (Q. B. D.), it is said: "Juries would, of course, take different views, according to the train service of their locality; and, if the management of good traffic depended on their decision, it would become a chaos, resulting in the ruin of the company under an avalanche of litigation." This language refers particularly to the reasonableness of time schedules, but might apply as well to rates.

v. *Croxtan*<sup>1</sup> has this language: "Admittedly the rate fixed is reasonable—the *legislative will so declares*—but what is reserved? What is it that the public is interested in reserving? Manifestly that the rate should *continue* reasonable, and what was to be deemed reasonable in the future the *legislature* was to decide, whenever it chose to act."

But the legislative discretion as to reasonableness has now become so straitly circumscribed by the Federal courts, that we may expect their lead to be followed by the courts of the states; and, unless a decided change comes in judicial opinion generally, few such instances as that just cited from Kentucky can be noted anywhere. Mr. Justice Brewer's suggestion that the question is one of fact for the jury seems to have met little favor, although the reasons he adduces are weighty. It is true, however, that a jury's verdict on such matters might be very uncertain and inclined against the railway irrespective of the facts, and the facts are usually presented in the form of tables and intricate calculations very puzzling to the layman. Indeed, even the judge seems not particularly fitted for technical problems of railway construction and management. *Prima facie* the proper authority for the adjudication of such questions would be a body composed of persons especially trained in railway affairs. If rates must be fixed by any one other than the officials of the railway company, a commission of experts certainly would seem, theoretically at least, the ideal body for assessment of the charges. Mr. Justice Harlan himself says: "What are the considerations to which weight must be given when we seek to ascertain the compensation that a railroad company is entitled to receive? . . . Undoubtedly that question could be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies (qualify) them to so handle great problems of transportation as to do justice both to the public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people. But despite the difficulties that confessedly attend the proper solution of such questions, the court cannot shrink, etc."<sup>2</sup>

<sup>1</sup> 98 Ky. 739 (1896).

<sup>2</sup> Opinion Nebraska Freight Case, *supra*, at p. 527.



It will be remembered that the early Vermont Act of 1849 provided that its Supreme Court, on petition of ten freeholders, should alter or reduce rates as they should deem expedient. This provision (which is believed to be unique among statutes of this kind) is still substantially in force: "The Supreme Court, at any term thereof, on application in writing of three or more freeholders of the state . . . may from time to time . . . alter or reduce the toll of any railroad operated in this state."<sup>1</sup> This expressly makes the court a commission for fixing rates. But commissions have usually consisted of persons specially appointed for that purpose.

The New Hampshire law provides for a Board of Railroad Commissioners consisting of three persons. "No person who owns railroad stock, or who is employed by a railroad corporation, or who is otherwise interested in one, shall be eligible to the office. No more than two members shall be appointed from one political party." The members of the commission are appointed by the Governor. "The expenses of the Board, including the salaries of its members, shall be borne by the railroad corporations in proportion to their gross receipts." . . . "The Commissioners shall fix the maximum charges to be made by the proprietors of railroads with the state for the transportation of persons and freight, and shall change the same from time to time as the public good shall require, subject to existing limitations. The rates so fixed shall be binding upon the proprietors."<sup>2</sup> Thirty-two states<sup>3</sup> have commissions similar to that of New Hampshire. Not all, however, have the privilege of changing rates.

<sup>1</sup> See Vermont Statutes of 1894, p. 696; secs. 3896 and 3897.

<sup>2</sup> Public Statutes of New Hampshire, pp. 428, 429, 430 (1891).

<sup>3</sup> These states include Alabama, Arkansas, California, Connecticut, Colorado, Georgia, Illinois (warehouses also), Iowa, Kansas, Kentucky, Maine, Massachusetts, Minnesota (warehouses), Mississippi, Missouri (warehouses), Nebraska (railroads, telegraphs, telephones, express-companies, warehouses), New Hampshire, New York, North Carolina, North Dakota, Ohio (railroads and telegraphs), Oregon, Pennsylvania, (Department of Internal Affairs), South Carolina, South Dakota, Texas, Vermont (it is expressly provided that the Acts of the Vermont Commissioners shall not "impair the rights or duties of the railroads." As already stated, the rate-making power is in the Supreme Court); Virginia, Wisconsin.

The fact that so many states have established bodies like those described, and the high opinion entertained of them by the United States Supreme Court, would seem to point to greater success in rate-making by commissions than in that by direct legislative action, such as was considered in the Nebraska case. On the other hand, it might possibly be anticipated that the courts would be jealous of the powers and jurisdiction of the newly-established commissions, as the old judges of the common law were of the admiralty and equity courts. The latter anticipation has proved correct. The experience of one state will illustrate the general attitude the courts have adopted toward the railroad commissions.

In 1887 the State of Florida established a railroad commission<sup>1</sup> with powers similar to those of the Board of Trade under the English Railway and Canal Traffic Act. In an action brought by the state<sup>2</sup> to recover penalties alleged to have been incurred under the Railroad Commission Acts, the railroad pleaded "that it could not pay the expenses of operating its road by charging for transportation of persons and things the rates fixed for it by the railroad commissioners, or by charging less rates than those charged by it to the passenger named." To this plea the state demurred. The Supreme Court declared that "the legal proposition asserted by the Circuit Court in sustaining the demurrer to this plea is that the state may, through the instrumentality of the commissioners, prescribe and may enforce through the courts, passenger and freight tariffs which do not pay the railroad company the expenses of operating its road; that the judgment or discretion of the commissioners is conclusive as to the reasonableness of the rates as against the interference of the courts or any other power, except it may be the legislature. . . . The commissioners say the company must not charge more than three cents, although it will compel a loss of money, and the company says it cannot pay operating expenses at the rates of freight and passenger charges pre-

<sup>1</sup> See Revised Stats. of Florida, 1892, p. 746, §§ 2287 and 2288.

<sup>2</sup> Pensacola, etc., R. v. State, 25 Fla. 310, 3 L. R. A. 661, Raney, C. J., 1889.

scribed by the commissioners, or without charging  $4\frac{11}{16}$  cents per mile. Our opinion is that the action of the commissioners in prohibiting the larger rate is a palpable abuse of their discretion and a trespass upon the rights of the company, and one which, if enforced with the freight rates prescribed, would amount in law and in fact to taking the property of the company without just compensation. It is not a reasonable rate, considered either with reference to the interests of the people or those of the railroad company, or both."

The attitude of the court seems unfavorable. The statute creating the commission is strictly construed against that commission's powers, and the court shows no disposition to allow the business before the commissioners to get beyond judicial reach. The result of the condition of things in Florida was the repeal of all the Railroad Commission Acts.<sup>1</sup>

*Railroad Commission v. R.*<sup>2</sup> likewise held that "whether the rules and regulations of the railroad commission are reasonable or not, is a question of law for the court." The finding of the court in this case, however, was favorable to the commission.

The United States Supreme Court had declared in the Railroad Commission Cases<sup>3</sup> that a Board of Commissioners is a proper tribunal for determining the proper rates of fare and freight on the railroads of a state. But in the Minnesota cases,<sup>4</sup> the Minnesota Railroad Commission Act was declared unconstitutional because the act provided that the rates recommended by the commission should be "final and conclusive as to what are equal and reasonable charges." The courts were not allowed to interfere. "In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, *if it chooses to establish rates that are unequal and unreasonable.*"<sup>5</sup> Thus it

<sup>1</sup> Revised Statutes of Florida, 1892. Appendix. Chap. 4068.

<sup>2</sup> 40 S. W. 526 (Court of Civil Appeals of Texas, April 28, 1897).

<sup>3</sup> 116 U. S. 307 (1886).

<sup>4</sup> 134 U. S. 418 (1890).

<sup>5</sup> Following this decision, *Southern Pacific Company v. Board of R. R. Com.*, 78 Fed. 236 (C. C. N. D. Cal., 1896), held that the functions of a

appears that both Federal and State Courts refuse to recognize the standing of State Railroad Commissions. Naturally the commissioners have chafed under this restraint of the courts. The State Railroad Commissioners, at their annual conventions at Washington, have expressed very frankly their opinions in the matter.<sup>1</sup>

The condition of the Interstate Commerce Commissioners has been no better than that of the state officials. When questions that had been investigated by the commissioners were brought to the attention of the courts, they refused to attach weight to the laborious findings the commissioners had made. Chairman William R. Morrison, of the Interstate Commission, said, in 1892,<sup>2</sup> "When an investigation has been made, involving vast expense, witnesses summoned from different parts of the country, or, if you please, when the commissioners have gone to the localities, and made investigation, and reached a conclusion, it (they) must go to the courts to enforce the orders made on the conclusion arrived at, and as the law now stands, the court, before it undertakes to enforce orders, undertakes to ascertain whether they are lawful orders in a new trial and investigation. After we have investigated questions, made orders, and reached conclusions, necessarily at great expense, and then go into court and ask the enforcement of our orders, the roads respond and make an entirely new case and call new witnesses. . . ." Commissioner

railroad commission "are not so purely legislative that it is not amenable to the control of the courts, when it attempts to enforce a tariff of rates which is unjust and unreasonable, . . . and that, while a state has power to regulate railroad rates, such power, as well as the right of a railroad company to control its business, stops at injustice, the state having no right to fix a rate unreasonably low, though it may prevent a railroad from fixing one unreasonably high." A provision of the California Constitution making the rates fixed by the commission conclusively just and reasonable was pronounced void as in conflict with the Fourteenth Amendment. This case occupies about forty pages, a large part of which consists of columns of figures and arithmetical computations of receipts and expenditures, rendered necessary by the investigation into the railroad business such cases always entail.

<sup>1</sup> See Reports of the Conventions.

<sup>2</sup> Report Fourth Annual Convention R. R. Com., April, 1892, pp. 123, 136.

Veazey said at the same time, "Under the construction which two or three Federal courts of the country have given this act, they have made it in this respect (as to speedy and economical remedy) a delusion and a snare. It does not operate as a speedy, expeditious and economical remedy to the complainant in any instance when the railroad company sees fit not to obey the order of the commission. . . . The trouble was that in this new trial before the courts the witnesses had to be called in from all over the country, and the complainant had to bring in his witnesses all over again, . . . Under this construction of the act adopted by the courts the railroad company does not feel obliged to bring any more evidence before us than it feels disposed to offer . . . and relies on the prospect of a new trial when it can bring in what witnesses it chooses. . . . If the Interstate Commerce Commission is composed of men such as they ought to be, it may be assumed that they are as capable of getting at the truth of the matter involving transportation charges, or like subjects, as any one inexperienced man, however able he may be. That is all there is of this question. . . ."

Mr. Allen Fort, Chairman of the Seventh Annual Convention of Railroad Commissioners, in his address to the Convention, May, 1895,<sup>1</sup> declared, "I concede, of course, with the greatest respect, that it must be the observation of all that nearly all of our appeals to the courts have not met with that kind of assistance which we had reason to hope or expect. The conservatism of the courts, if you please, has been an obstruction to efficient and prompt railway regulation. Let us hope that it will not always be so, but that there will be that harmony between these tribunals and the courts and the railroads that will remove the difficulty, that will secure even and exact justice to the public, and at the same time, and under any and all circumstances even and exact justice to the railroads."

Mr. H. C. Adams, Statistician of the Interstate Commerce Commission, says: "Had it been possible for the courts to accept the spirit of the act (creating the commission), and to

<sup>1</sup> Report p. 9.

render their assistance heartily and without reserve, there is reason to believe that the pernicious discrimination in railway service and the unjust charges for transportation would now be in large measure things of the past. As it is, the most significant chapter in the history of the commission pertains to its persistent endeavors to work out some *modus vivendi* without disturbing the dignity of the judiciary. . . . Had the courts been willing to grant the law the interpretation that Congress assumed for it when it was passed, the railway problem would by this time have approached more nearly its final solution.<sup>1</sup> Mr. Adams, in the same article, sums up the matter as follows: "What conclusion is warranted by this rapid review of ten years' experience with the Federal acts to regulate commerce? . . . The record of the Interstate Commerce Commission during the past ten years, as it bears upon the theory of public control over monopolistic industries, through the agencies of commissions, cannot be accepted as in any sense final. It may ultimately prove to be the case, as Ulrich declares, that there is no compromise between public ownership and management on the one hand, and private ownership and management on the other; but no one has no right to quote the ten years' experience of the Interstate Commerce Commission in support of such a declaration. This is true, because the law itself scarcely proceeded beyond the limit of suggesting certain principles and indicating certain processes, and Congress has not, by the amendments passed since 1887, shown much solicitude respecting the efficiency of the act. It is true, also, because the courts have thought it necessary to deny certain authorities claimed by the commission, and again Congress has not shown itself jealous for the dignity of the administrative body which it created; and, finally, it is true, because the duty of administering the act was imposed upon the commission without adequate provision in the way of administrative machinery, and ten years is too short a time to create that machinery, when every step is to be contested by all the processes known to corporation lawyers. For the

<sup>1</sup> "A Decade of Federal Railway Regulation," By Henry C. Adams, Atl. Monthly, April, 1898.

public the case stands where it stood ten years ago. Now, as then, it is necessary to decide on the basis of theory, and in the light of social, political and industrial consideration, rather than on the basis of a satisfactory test, whether the railways shall be controlled by the government, without being owned or controlled through governmental ownership. The danger is that the country will drift into an answer of this question without an appreciation of its tremendous significance."

In the case of *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R.*,<sup>1</sup> known as the "Chicago-Cincinnati Freight Bureau Case," Mr. Justice Brewer said: "The question debated is whether it (Congress) vested in the commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions,

<sup>1</sup> 167 U. S. 479 (1897). This opinion followed *Cincinnati, Etc., R. v. Interstate Commerce Commission*, 162 U. S. 184 (1896), and was affirmed by *Interst. Com. Commission v. Ala. M. Ry.*, 168 U. S. 144, 173 (1897). See, also, *Interst. Com. Commission v. Western & A. R.* 88 Fed. 186 (1898). In the "Orange Rate Case," *R. R. Com. of Fla. v. R.*, 5 Int. C. C., 13 (1891), the commission undertook to regulate rates by themselves prescribing charges which they considered reasonable. This attempt aroused great excitement and anger on the part of many people, and when the United States Supreme Court, at the same time it delivered its opinion in the Cincinnati-Chicago Freight Bureau Case, overruled the action of the commission (see *Savannah, F. & W. R. v. Florida Fruit Exch.*, 167 U. S. 512 [1897]), there was considerable relief. This was put into expression by Jos. Nimmo, Jr., in an article in the *Forum* in September, 1897. Mr. Nimmo said: "And now the highest court of the Federal Judiciary has repelled a similar attempt of the commission to usurp the power of determining the limits of the commercial opportunity of cities, states and sections, and of dictating the course of the commercial and industrial development of this vast country through the power of rate making." The complaint of the possible unjust operation on various localities of rates made by the commission, appears strange when one considers the present discriminations and dictations employed to build up certain sections and localities at the expense of others by private individuals for their own personal gain. The possible abuse of power by men appointed to make rates in the public interest will scarcely be likely to result in effects more disastrous.

the language by which the power is given had been so often used and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication." Mr. Justice Harlan dissented.

After viewing the breakdown of the commission plan in the United States, it will be interesting, and perhaps instructive, to observe its operation in England. The Railway and Canal Traffic Act of 1888 provided for a Board of Trade, which should have general supervision of railways and should determine, after conference with the railroad officials, upon schedules of rates. "In any case in which a railroad company fails within the time mentioned in this section to submit a classification and schedule to the Board of Trade, and also in every case in which a railway company has submitted to the Board of Trade a classification and schedule, and after hearing all parties whom the Board of Trade consider to be entitled to be heard before them, the Board of Trade are unable to come to an agreement with the railway as to the railway company's classification and schedule, *the Board of Trade shall determine the classification of traffic which, in the opinion of the Board of Trade, ought to be adopted by the railway company, and the schedule of maximum rates and charges, including all terminal charges proposed to be authorized applicable to such classification which would, in the opinion of the Board of Trade, be just and reasonable, and shall make a report to be submitted to Parliament, etc.*"<sup>1</sup> (Italics are mine.) In 28 L. R. Stats. P. XV, 54 & 55 Vict., A. D. 1891, I discover a number of "Public Acts of a Local Character" in the following form: "C C XIV. An Act to confirm a Provisional Order made by the Board of Trade under the Railway and Canal Traffic Act, 1888, containing the classification of Merchandise Traffic, and the 'Schedule of Maximum Rates and Charges applicable thereto of the Great Eastern Railway Company.' . . ." This act seems to be somewhat more practicable than its predecessor of King William's time.

No question can arise under the British Constitution as to

<sup>1</sup> See 25 L. R. Stats. p. 157; Acts 51 & 52 Vict., chap. 25, § 24. Amended 31 L. R. Stats. p. 180, 57 & 58 Vict., ch. 54.



the power of the Board of Trade to determine conclusively the rates which shall be reasonable, and the confirmation of Parliament seems to follow quite as a matter of course. There is never any doubt expressed about the ability of the Board to do its work properly. The respect with which the British treat the decisions of their tribunals is an object lesson for us. Observe, in contrast, the following: "If such authority (as that of making rates) had been granted to the (Interstate Commerce) Commission, it would inevitably have engendered sectional strife, resulting in serious political disturbances. The idea that the Interstate Commerce Commission is capable of performing the service of rate-making efficiently or beneficially, seems too absurd for serious consideration."<sup>1</sup> Such words as these seem to be excused by the attitude already referred to of the courts toward the commission, and by their language, in some instance, also.<sup>2</sup>

The opinion of Mr. Justice Harlan dissenting in *Int. C. C. v. Alabama M. R.* is pertinent here: "Taken in connection with other decisions . . . the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes. . . . It has been shorn, *by judicial interpretation*, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it." . . . Remembering these expressions of the learned justice, and taking them in connection with his own opinion in *Smyth v. Ames*,<sup>3</sup> it must be concluded that the Supreme Court of the United States has found itself unwilling, under present conditions, to allow effective authority to special railway bodies, either state or national.

<sup>1</sup> See article by Joseph Nimmo, Jr., in the Forum for September, 1897. Mr. Nimmo adds to the language quoted, "An experience of twenty years as an officer of the government at Washington convinces me that governmental management of the railroads is utterly incompatible with the Constitution and the methods of the administrative government of the United States."

<sup>2</sup> For example, note the sarcastic allusions to the "naïve remarks" of the Interstate Commission, in *Texas & P. R. v. Int. C. C.*, 162 U. S. 197.

<sup>3</sup> 168 U. S. 144, at p. 176 (1897), *supra*.

Judicial construction has effectually destroyed legislation intended to make rates for railroads. In the matter of government fixing of transportation charges, we seem, as Emerson says most men have done, to have "arrived with pain and sweat and fury nowhere." The same result must be reached in the case of quasi-public corporations generally. Practically all of these have shareholders in different states, so that in every case the Federal Courts would have jurisdiction. If the city, or county, or state fixes a maximum charge the defence "due process" can be raised, and an injunction obtained from the nearest circuit court.<sup>1</sup> In from two to five years, the case on appeal will be reached in the United States Supreme Court, which body will then discover a "reasonable basis of calculating" the profit of gas or electric light making, or of the telegraph or telephone business; make an investigation of the figures in the case, and finally pronounce the rates either constitutional or unconstitutional. In the meanwhile a western city will have had time to increase its population enormously, and the rates appearing on the records before the court will be ancient history long before the decision is declared. A condition which places the determination as to charges in business of a quasi-public nature all over the country, in the hands of the Supreme Court, is inconvenient to say the least. But that is the condition confronting us. Could any different result have been reached under our constitution? Possibly. An attitude a little more like that of the English, a little more fearful of extending judicial prerogatives, a little less eager to

<sup>1</sup> Cases of this kind are multiplying very fast. In *Northern P. R. v. Keyes*, 91 Fed. 47 (1898), a rate fixed by the Board of Railroad Commissioners of North Dakota (acting under ch. 115, Laws, 1897), was declared unreasonably low. In *San Diego Land & Town Co. v. Jasper*, 89 Fed. 274 (1898), irrigation rates established under the constitution and laws of California, were annulled as unreasonable and unjust. In *Milwaukee Electric R. & L. Co. v. City of Milwaukee*, 87 Fed. 577 (1898), a case referred to in the first article of the series in December, '98, the prescribing of a four cent fare for street railroads was pronounced a "taking" without due process. I see by the newspapers that a similar decision was reached the other day (May 16th) by Ricks, J., in the United States Circuit Court at Cleveland. There are many other cases of like character too numerous for collection in this note.

construe Bills of Rights and Fourteenth Amendments into sweeping denials of legislative power, might have brought us a result somewhat more satisfactory. How have the English solved the vexed question of a reasonable rate? Their definitions are no better than ours, but they know better how to decide individual cases :

(1) If a statute, say of railway incorporation, contains the word "reasonable," and no provision is made for assessment of rates, "reasonableness" is a judicial question, being a part of the interpretation of the statute. See *Pickford v. Grand Junction Ry. Co.*<sup>1</sup> So, also, under the common law requirement as to rates.

(2) Under parliamentary provisions railway and canal regulation in general is entrusted to a commission, and this body as a court—presumably as able as the *other* courts of England—decides questions of undue preference and reasonableness. See *Plymouth Inc. Chamber of Commerce v. Great W. R.*<sup>2</sup>

(3) Then the Railway and Canal Traffic Act, as has been described, vests the rate-making power in the Board of Trade. Now, accordingly, the Board of Trade, or the arbitrator appointed by it, has the *exclusive determination* of the reasonableness of a rate, as to amount, and no court can interfere. See *Manchester & N. C. Federation of Coal Traders v. Lancashire & Y. R.*<sup>3</sup>

This seems a perfectly intelligible result: "Reasonableness" a matter of law for a common law court, when it depends solely on statutory construction; a mixed question of law and fact for a body of trained experts, called railroad commissioners, when it involves "undue preference," when a decision must be rendered on what might be termed "relative reasonableness;" a matter of administration for the Board of Trade when the amount must be decided as a question of "absolute reasonableness."

Of course, the Federal character of our government renders so simple a result impossible here, and yet it is quite

<sup>1</sup> 10 M. & W. 399 (1842).

<sup>2</sup> 9 Ry. & Can. Traf. Cas. 72 (1895).

<sup>3</sup> 76 L. T. 786 (1897).

conceivable that a working plan could have been arranged, with a division of jurisdiction and responsibility between the State and Federal commissions. The question of restraint of the too radical zeal of "Populistic" commissions in rural states comes in also, and has furnished perhaps the best apparent excuse for the judicial legislation that has landed us where we are. But it seems certain that the harm done by these "radicals" could not have been as great as that often accomplished in shorter time by skillful railroad "wreckers," under forms of law, and with evil results outlasting those wrought by ill-considered governmental interference. But it is of no use to regret the past action of our courts. We have before us their handiwork, and the question now is the untangling of the difficulty. Nothing seems more promising to the writer than the plan recommended by the Interstate Commerce Commission :

(1) Congress should grant the rate-making power, in certain cases, to the commission.

(2) The review of the commission's rates by the Federal courts should end with the Circuit Court of Appeals. That body's judgment, in short, should be final. By this means a speedy end could be brought to any dispute.

Similar rules adopted for state commissions, with proper expedients for correlating Federal and state control of railroads, would give us a result of more satisfactory promise than the continental system of state ownership, and perhaps almost as smooth in its working as the English plan above outlined. It is to be hoped that some definite scheme, at any rate, will soon replace the present uncertainty.

*Roy Wilson White.*